REPLY BRIEF

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 22,627

PORT ANGELES TELECABLE, INC., *Petitioner*

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*
KVOS TELEVISION CORPORATION, *Intervenor*

On Petition for Review of Memorandum Opinion and Order of the Federal Communications Commission

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REPLY BRIEF

Comes now Port Angeles Telecable, Inc., petitioner herein, and pursuant to Rule 18 of the Rules of this Court, replies to the Brief for Respondents dated May 24, 1968 and the Brief for Intervenor bearing the same date.

Statement of Questions Presented

Respondents claim that the following question calls for an answer:

> "Whether section 405 of the Communications Act, 47 U.S.C. Section 405, bars review of claim of error which were not presented to the agency." (Brief for Respondents, p. 8).

All of petitioner's legal and constitutional arguments were presented in substance to the Commission in the proceedings which led to the issuance of the *First* and *Second Report and Order*. Petitioner so stated in its Brief (Brief for Petitioner, pp. 11, 28, 29, and 56). Respondents and Intervenor have not denied this in their Briefs. To the contrary, Respondents have acknowledged that fact, stating:

> "The restrictions to which Port Angeles is now subject were imposed after a rulemaking proceeding in which all the legal and policy issues were fully explored. Petitioner had every procedural opportunity to which it is entitled to participate in that rulemaking, and did so through its participation in a trade association which filed comments with the Commission." (Brief for Respondents, p. 21).

In its Memorandum Opinion and Order released January 23, 1968 (R. 0015), by which the Commission denied Petitioner's Request for Waiver (R. 0016) of the nonduplication of Section 74.1103(e) of the Rules of the Commission (47 C.F.R. 74.1103(e)), adopted March 8, 1966 (attached to petitioner's Brief as Appendix A), the Commission did not rely on special findings, but it relied entirely on its findings and legal arguments in the *Second Report and Order* (See, for example, R. 0016 and Brief for Respondents, pp. 7 and 11). The Commission cannot itself rely entirely on the *First* and *Second Report and Order* for its findings and legal arguments in this case and, in turn, deny to petitioner the right to rely on the legal and constitutional arguments which it filed in the proceedings which

led to those orders through its trade association. The Commission is seeking to compel petitioner to abide by the *Second Report and Order* and all of the legal and constitutional arguments presented by petitioner in the instant case were presented to the agency in substance in the proceedings which led to the *First* and *Second Report and Order* of which this denial of a *Petition for Waiver* filed pursuant thereto is part and parcel.

Argument

Respondents state that "In its request for waiver, Port Angeles did little more than allege that KVOS-TV would not be injured by grant of the requested relief." (Brief for Respondents, p. 9). Petitioner in its Petition for Waiver (R. 0001-0008, R. 25) stated many facts which proved KVOS-TV would not be adversely affected (R. 0004-0006, R. 25, R. 26 and Brief for Petitioner, pp. 12-13). The fact, which was not denied and is not in dispute, that Television Station KVOS serves a potential of 368,200 television households in British Columbia and only 145,700 such households in the United States (R. 0005 and R. 26) and that it caters to advertisers within its Canadian coverage (R. 0004 and R. 26) is not a fact applicable to most or to the average television station in the United States for which the *Second Report and Order* was adopted. The fact that Port Angeles is a Seattle suburb and that Seattle advertisers cater to the Port Angeles market while Bellingham advertisers do not (R. 0004 and R. 27) tends to prove that KVOS would not lose advertising and, therefore, would not be financially injured. If the Commission's non-duplication rule was adopted to protect the television station, it would fail to accomplish its objective in this case and the waiver should have been granted. The Commission or KVOS could have presented facts to dispute these contentions but they did not. The Commission could and should have ordered a hearing to determine the facts. The Commission simply chose to say the *Second Report* applies

and KVOS' pleading before the Commission and before this Court simply states it has a right to the protection under the Second Report. The Commission concedes its arbitrariness when it states, in effect, that even if petitioner had proven irrefutably that KVOS would not be injured, it would not have granted the waiver. (R. 0015, par. 2 and Brief for Respondents, pp. 11 and 12). This is injustice by the numbers. Provided the Commission feels the remedy is suitable to most television stations, then all of them are entitled to the protection. This follows in spite of the fact that the CATV industry and petitioner through their trade association asked for and were denied an evidentiary hearing, in the proceedings which led to the *First and Second Reports and Orders,* in order to prove or disprove the fact or myth that CATV operators have an economic impact upon television stations (Brief for Petitioners, pp. 55 and 56).

Respondents' reliance upon United States v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), and other cases (Brief for Respondents, p. 10) is of no avail to them, because petitioner did state in its Petition for Waiver reasons, sufficient if true, to justify a change or waiver of the rule in question which rule could serve no useful purpose if petitioner's allegations were true. The Commission did not bother to check into the facts or to order a hearing to establish the accuracy or the truth or falsity of petitioner's statements.

As in *Presque Isle TV Co., Inc.* v. *United States,* 387 F. 2d 502 (1st Cir. 1967), the facts presented a unique factual situation to which the Commission had not addressed itself in the *Second Report.* Nowhere in the *Second Report* is there an indication that the rules were meant to apply to a television station (like KVOS) which derives its advertising revenue exclusively or almost exclusively from Canadian markets so that carriage of other American television stations' programs (such as from Seattle) will

not deprive the other station (KVOS) of its advertising revenue. In the *Presque Isle* case, the United States Circuit Court for the Fourth Circuit remanded the case to the Commission to ascertain the truth or falsity of the CATV system operator's claims. Furthermore, nowhere in the *Second Report* is there an indication that the Commission will apply its non-duplication rules, if all the signals of the television stations involved are received by people throughout the CATV community with the use of roof-top or rabbit-ear antennas. Under such circumstances, the purpose of the rule is non-existent and constitutes an unjust discrimination against the subscribers of the CATV system and the owners of the CATV system. This interpretation of its rules is violative of the due process clause of the Fifth Amendment to the Constitution of the United States. (Brief for Petitioner, pp. 58-60).

Respondents state that the burden on the injury question plainly falls on the party seeking an exemption from the ordinary operation of the rule. (Brief for Respondents, p. 9). This is the manner in which the Commission protects television stations regardless of need. The television station knows what its profits are and to what extent, if any, it is being injured by CATV operators. It must file a financial statement with the Commission each year outlining its revenues, expenses and profits. This statement is not made available for public inspection and it may be obtained in a hearing only if the opponent requests it and if the station itself alleges adverse economic impact.

In a case such as this one, wherein the Commission has the sole discretion under its rules (Rule 74.1109(f), Brief for Petitioner, Appendix A, at p. 6.a.) to order a hearing, there is no way in which one who files a Petition for Waiver can obtain these financial records of the complaining television station in order to be able to bear the burden of proving that his CATV operations will not adversely affect the television station, unless a hearing is held. Even if a

hearing is held, if the television station lets the Commission's staff proceed to resist the Petition for Waiver, as most television stations do, and the television station does not allege that it will be adversely affected, the Commission will deny access to the financial returns of the television station.

Instead of protecting the viewing public's right to view the television signals of its choice and placing upon the television station requesting protection the burden of proof of establishing that the particular CATV system will adversely affect its financial status, the Commission has loaded its *Second Report and Order* with an irrebuttable presumption that the television station will be adversely affected through the duplication of its programs by another television station on the CATV system.

This the Commission decided in the face of the fact that the average commercial television station currently makes about 100% return on its capital investment each year before taxes and depreciation (R. 34 and Brief for Petitioner, p. 24). This was not denied by Respondents or Intervenor.[1]

Section 405 of the Communications Act does not preclude review of petitioner's contentions because the Agency did have the opportunity to and did rule upon all of them.

Respondents raise the same objection as they did earlier in this case with respect to petitioner's request for an injunction against the Commission pendente lite which injunction was granted. Respondents state:

> "Section 405 of the Communications Act 47 U.S.C. § 405, unequivocally establishes that no "question of fact or law" may be raised on appeal which petitioner has not first raised before the Commission." (Brief of Respondents, p. 13).

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[1] See current article by Commissioner Nicholas Johnson of the FCC in which he states that "television broadcasters average a 90 to 100 percent return on tangible investment annually." "Media Barons and The Public Interest," The Atlantic, June 1968, p. 43, at p. 48.

The short answer to this is that all of the questions of fact and law in this case were raised before the Commission. ("See Statement of Questions Presented," *supra,* at page 2).

None of the cases cited by Respondents involve a factual situation similar to the one in the instant case. In the instant case, contrary to the situations in the cases cited by the Commission, petitioner has averred and Respondents have conceded that "all the legal and policy issues were fully explored." (Brief for Respondents, p. 21, and see "Statement of Questions Presented," *supra,* at page 2.)

Respondents quote from 47 U.S.C. 405 (Brief for Respondents, p. 13, f.n. 8). The last part of the quotation does establish that the filing of a petition for rehearing before the Commission thereunder is a condition precedent to judicial review where the party seeking such review relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.

In the instant case, the Commission has had the opportunity to pass upon all the legal and constitutional questions and simply ignored some of them, but did rule upon others in the *First Report and Order,* 38 F.C.C. 683 (1965) and in the *Second Report and Order,* 2 F.C.C. 2d 725 (1966). The great number of Petitions for Waiver of the *Second Report and Order* which are filed by individual CATV operators without the services of a lawyer do not contain legal or constitutional grounds, as in the case of petitioner. The Commission invited this by providing for an informal petition in Rule 74.1109(b) (Brief for Petitioners, Appendix, p. 5.a.).

In the case of *Presque Isle TV Co., Inc.* v. *United States,* 387 2d 502 (1st Cir., 1967), upon which Respondents so heavily rely, petitioner therein had not alleged that the

agency had an opportunity to pass upon the legal and constitutional questions, so the case is inappropriate with respect to its application to the instant case. The same is true of the other cases cited by Respondents.

The Court must interpret very strictly statutes which purport to limit the constitutional rights of a litigant, such as the right of due process of law pursuant to the Fifth Amendment to the Constitution of the United States.

The question of jurisdiction of the Commission, at the very least, can be raised, because to hold inquiry into this matter foreclosed, if in fact there is no jurisdiction in the Commission, would be a usurpation of authority that the Congress has not conferred. Cf. *Mansfield, C. & L. M. Ry.* v. *Swan,* 1884, 111 U.S. 379; *Louisville & N.R.R.* v. *Mottley,* 1908, 211 U.S. 149; *Treinies* v. *Sunshine Mining Co.,* 1939, 308 U.S. 66, 70; *United States* v. *L. A. Tucker Truck Lines, Inc.,* 1952, 344 U.S. 33; *Manual Enterprises, Inc.* v. *Day,* 1962, 370 U.S. 478, opinion of Mr. Justice Brennan at 499, n.5.

In the case of *NLRB* v. *Ochoa Fertilizer Corp.,* 1961, 368 U.S. 318, although the Supreme Court of the United States applied a restriction on appeal where contrary to the instant case, the agency had not had an opportunity to pass upon certain questions of law, the Court mentioned a possible exception where the agency "patently traveled outside the orbit of its authority (at p. 322). There can be no doubt that the Commission is venturing into new fields in attempting to create new rights in the copyright field and in creating new rules of "fair competition", is patently travelling outside the orbit of its authority (Brief for Petitioner, pp. 53-57). This is a case where the Commission is attempting to exercise an authority entirely foreign to and inappropriate for this particular agency, and the case of *Presque Isle TV Co., Inc.* v. *United States, supra,* which is relied upon by Respondents, recognized this exception.

Furthermore, in this case, if Section 405 of the Communications Act, *supra,* were interpreted as suggested by Respondents, petitioner effectively would be deprived of the opportunity to present its case to a Court prior to the Commission's order taking effect. Petitioner would have to spend many thousands of dollars to carry out the Commission's non-duplication Rules (R. 32) and petitioner's subscribers would be deprived of the television programs of their choice (R. 32 and 33) and the public would be deprived of information and advertising messages (R. 31, Brief for Petitioner, p. 21) before a court could examine the legality or constitutionality of the Commission's action.

This follows from the fact that Section 74.1109(h) of the Commission's non-duplication rules provides:

Where a Petition for Waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures. (Memorandum Opinion and Order of the Federal Communications Commission in Docket No. 15971, Released on April 21, 1966).

This has been interpreted later by the Commission to apply to the non-duplication provisions of 74.1103 as well.

Accordingly, when the television station requested non-duplication, as Intervenor did in this case, petitioner had only 15 days within which to file a petition for Waiver. Under Rule 74.1109(b) (Brief for Petitioner, Appendix, p. 5.a) "the petition may be submitted informally." Under 74.1109(c) (Ibid.), the petition "shall state fully and precisely all pertinent facts and considerations relied upon *to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest.*" (Emphasis supplied.)

Petitioner's manager followed this informal procedure. He supplied all the information requested in the Commission's Rules. Rule 74.1109 mentions nothing about legal or constitutional objections to the *Second Report and Order* having to be filed in the Petition for Waiver. All the Commission asks for is "all pertinent facts and considerations relied upon to support a determination that a grant of such relief would serve the public interest." Petitioner obviously could not have economic studies conducted within the 15 days, although if a hearing had been ordered, he could have done so.

Until petitioner was requested by a television station to afford it non-duplication, the *Second Report and Order* did not adversely affect petitioner in an immediate way. Intervenor might never have asked for this protection. When Intervenor did request such protection, then Intervenor had only 15 days within which to file his Petition for Waiver and in that short a time he could only state facts which, if true, called for a change or waiver of the *Second Report and Order* in the way it affected petitioner's operations. This he did. The Commission could have granted the waiver based upon petitioner's petition supported by affidavit or it could have ordered a hearing to explore the facts further. The Commission did neither. It arbitrarily and summarily denied the Petition for Waiver.

At this point, petitioner retained counsel. If a Petition for Rehearing pursuant to 47 U.S.C. 405 then had been filed, petitioner would have had to comply with the non-duplication rules and incur many thousands of dollars, because the Commission is notoriously slow in processing pleadings. For instance, petitioner filed its Petition for Waiver in this case on September 14, 1966 (R. 0001) and the Commission released its Memorandum Opinion and Order or decision in this case on January 23, 1968. (R. 0015). The Commission has uniformly and consistently ruled that the filing of a Petition for Reconsideration does

not stay the effective date for compliance with the Rules. *Teleprompter of Liberal, Inc.,* 9 Pike & Fischer, RR 2d 1291 (1967). Besides, Sec. 405 of the Communications Act provides "No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The Commission refuses to issue such special orders, except if an appeal is taken to the Courts after the Petition for Rehearing is denied and then it gives a party only about two weeks within which to apply to the Court if the time for appeal has not then expired. If a Petition for Rehearing or Reconsideration is pending before the Commission, it will not grant a stay of its order.

The result of this series of rules and policies is that the Commission effectively has insulated itself against a review of its actions in the Courts, if the Commission's interpretation of 47 U.S.C. 405 is correct under the circumstances of this case.

Petitioner cannot both file a Petition for Rehearing before the Commission and at the same time file a Petition for Review before a United States Court of Appeals. The Commission would have the Court appeal thrown out upon the grounds that the matter was still under consideration by the Commission.

The *Second Report and Order* was adopted without an evidentiary hearing being held, althopgh petitioner through its trade association requested an evidentiary hearing so that the facts could be established after cross-examination of the television broadcasters and CATV operators. This request was denied. Petitioner, through its trade association presented all the legal arguments presented in this case to this Court (R. 24, 25, 33; Brief for Petitioner, pp. 11, 28, 29, 56). The Commission rests its denial of the Petition for Waiver upon its findings and its legal arguments

in the *Second Report and Order,* but it then insists that the same legal and constitutional arguments had to be raised anew in this Petition for Waiver. In all cases where a CATV operator has retained a lawyer from the moment that a television station made a demand upon him for non-duplication or carriage, and these same legal arguments were included in the Petition for Waiver, the Commission has said that these legal arguments have no validity and the Commission has rested upon its *Second Report and Order* in denying relief. This agency has definitely been afforded an opportunity to pass upon the legal questions which have been raised by petitioner in this case, both in the proceedings which led to the issuance of the *Second Report and Order* upon which the Commission's rules affecting petitioner are based and in many similar Petitions for Waiver, and the Commission has denied their validity.

If the Commission is allowed to preclude Court review upon these technical and inapposite arguments, hundreds of CATV operators who have Petitions for Waiver on file with the Commission and who have not included legal and constitutional arguments will never have an opportunity to test the validity and reasonableness of the Commission's Rules. This would mean that they have in effect been baited by the Commission into filing an *informal* Petition for Waiver without knowing that such an informal petition was a booby-trap that would explode their right to a Court review. Any such interpretation limiting their constitutional rights is to be avoided if at all possible. Unless the remedy in the statute is exclusive, one must have an opportunity to test the validity of the orders of an agency before one is made to spend many thousands of dollars and risk financial failure in complying with the agency's rules or risk penalties under the Act. *Abbott Laboratories, et al.* v. *John W. Gardner, Secretary of Health, Education and Welfare, et al.,* 387 U.S. 136.

It is undoubtedly to avoid a result such as that advocated by the Commission in this case that Section 414 of the Communications Act provides:

> Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies. (47 U.S.C. 414).

The Constitution of the United States is the highest statute in the land. A similar provision (701(f)(6)) in the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 301 et seq.) caused the Supreme Court of the United States to allow a remedy in the Abbott Laboratories case, *supra*. In that case the Supreme Court stated:

> The question is phrased in terms of "prohibition" rather than "authorization" because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. *Board of Governors* v. *Agnew,* 329 U.S. 441; *Heikkila* v. *Barber,* 345 U.S. 229; *Brownell* v. *Tom We Shung,* 352 U.S. 180; *Harmon* v. *Bruckner,* 355 U.S. 579; *Leedom* v. *Kyne,* 358 U.S. 184; *Rusk* v. *Cort,* 369 U.S. 367. Early cases in which this type of judicial review was entertained, e.g. *Shields* v. *Utah Idaho Central R.R.,* 305 U.S. 177; *Stark* v. *Wickard,* 321 U.S. 288, have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a). The Administrative Procedure Act provides specifically not only for review of "Agency action made reviewable by statute" but also for review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704. The legislative material elucidating that seminal act manifests a congressional intention that it covers a broad spectrum

of administrative actions,[2] and this Court has echoed that theme by noting that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation. *Shaughnessy* v. *Pedreiro,* 349 U.S. 48, 51; see *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 433-435; *Brownell* v. *Tom We Shung,* supra; *Heikkila* v. *Barber,* supra. Again in *Rusk* v. *Cort, supra,* at 379-380, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review. See also Jaffe, Judicial Control of Administrative Action 336-359 (1965).

The case of *Buckeye Cablevision, Inc.* v. *FCC,* 387 F. 2d 220 (D.C. Cir., 1967), relied upon by Respondents (Brief for Respondents, p. 16, f.n. 11) is irrelevant. The case did not involve a factual situation to the instant case and did not raise the same legal questions, except with respect to jurisdiction.

Respondents rely upon *Wheeling Antenna Co., Inc.* v. *U. S. and FCC,* F. 2d (4th Cir., decided February 28, 1968). (Brief for Respondents, pp. 17 and 18) to deny that the non-duplication rule involves an illegal taking of property. The case is not in point.

In that case, appellant did not challenge the procedural correctness of the adoption of the *Second Report and Order* and did not attack the reasonableness of the Commission's Rules.

As this Reply Brief is about to be sent to the printer on June 10, 1968, word has come down that the Supreme Court of the United States on this day has ruled that the Com-

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[2] See H.R. Rep. No. 1890, 79th Cong., 2d Sess., 41 (1946): "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." See also S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1946).

mission does have jurisdiction over CATV systems.[3] The Court did not rule upon the reasonableness or the validity of the *Second Report and Order*. Accordingly, all of the issues in the instant case are still before this Court, except the question of the basic jurisdiction of the Commission over CATV systems.

Conclusion

For all the foregoing reasons the action below should be reversed and relief as prayed (Brief for Petitioner, p. 64) be granted to petitioner.

Respectfully submitted,

PORT ANGELES TELECABLE, INC.

By /s/ E. STRATFORD SMITH
E. Stratford Smith

By /s/ ROBERT D. L'HEUREUX
Robert D. L'Heureux

June 13, 1968.

Certificate

We certify that in connection with the preparation of this Brief, we have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in our opinion, the foregoing Brief is in full compliance with those rules.

By /s/ E. STRATFORD SMITH
E. Stratford Smith

By /s/ ROBERT D. L'HEUREUX
Robert D. L'Heureux
Attorneys

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[3] *Southwestern Cable Co., et al.* v. *United States of America and Federal Communications Commission* (378 F. 2d 118—C.A. 9, 1967); *United States of America and Federal Communications Commission* v. *Southwestern Cable Co., et al.* (Case No. 363. October Term, 1967) on certiorari to the Supreme Court of the United States.